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# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1970

No. 1304

FRED A. ALEXANDER, et al.,
*Petitioners,*

vs.

PACIFIC MARITIME ASSOCIATION,
a non-profit corporation, et al.,
*Respondents.*

## BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

### THE QUESTION PRESENTED

While the petition argues the merits of petitioners' claims, we submit that the only question is whether an issue of sufficient importance to warrant review by this Court is presented by the determination of the Court of Appeals that the District Court did not abuse its discretion in dismissing the proceeding for want of prosecution.

## REASONS WHY THE WRIT SHOULD NOT BE GRANTED

The petition fails to assign any of the reasons specified in Rule 19 of the Rules of this Court, which would justify the granting of the writ. It does not suggest that there is a conflict between the decision below and the decision of any other Court of Appeals or that the decision below conflicts with any decision of this Court. Indeed, a review of the relevant decisions demonstrates that the decision below is in perfect harmony with the already established case law in both this Court and the Courts of Appeal.

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### THE COURT OF APPEALS CORRECTLY HELD THAT THE ORDER DISMISSING THE COMPLAINT FOR WANT OF PROSECUTION WAS NOT AN ABUSE OF DISCRETION

#### The Facts

The Court of Appeals said that "[t]aking a long hard look at the entire record, therefore, we cannot say that the district judge abused his discretion in dismissing the complaint" (App. to Pet. for Cert., fifth unnumbered page; *Alexander v. Pacific Maritime Association*, 434 F.2d 281, 284 [9 Cir. 1970]).

The "long hard look at the entire record" revealed that petitioners' amended complaint, filed in April of 1962, was one for breaches of a collective bargaining contract which contained grievance-arbitration procedures to remedy such breaches;[1] that, pursuant to the

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[1]The original complaint filed in 1962 did not state a claim for breach of contract (*Alexander v. Pacific Maritime Association*, 314 F.2d 699, 694 [9 Cir. 1963]).

principles laid down in this Court's decisions, the District Court, on July 19, 1963, stayed the proceedings "pending disposition of the case on arbitration"; that petitioners delayed the filing of their grievances for ten and a half months thereafter, i.e., until June 5, 1964; that the local committee ruled promptly on their grievances, i.e., by July 22, 1964; that instead of pursuing their grievances to the next stage, petitioners waited another eight and a half months, i.e., until April 9, 1965, and then filed in the District Court a motion to modify the stay order; that when that motion was denied on April 26, 1965, because the grievance procedure had been only partially completed by petitioners, petitioners went back to the grievance machinery where the Coast Committee acted promptly and, on June 4, 1965, ruled on the grievances and advised petitioners of their right under the contract to appeal to the Coast Arbitrator; that this set the matter up for the last stage of the grievance machinery, i.e., an appeal to the Coast Arbitrator; that while petitioners did appeal to the Coast Arbitrator, "they failed to proceed with the arbitration procedures of the contract by refusing to agree to a clarification of issues" (App. to Pet. for Cert., fifth unnumbered page; *Alexander v. Pacific Maritime Association*, 434 F.2d at 282 [9 Cir. 1970]); that instead of proceeding expeditiously under the contract, petitioners once again went back to the District Court in an attempt to bypass the arbitrator; that the District Court once again refused to permit this to be done; that petitioners finally proceeded before the Coast Arbitrator, who rendered his decision, adverse

to their claims, on June 30, 1957; that, with the arbitration proceedings completed, petitioners were free to proceed to court, to seek to vacate and modify the Arbitrator's award; that they permitted the statutory time within which they could have done so (9 U.S.C. §12; *cf.*, California Code of Civil Procedure, §1288) to expire without taking any action at all; that they did nothing whatsoever until the District Court *sua sponte*, and pursuant to its local rules, issued an order to show cause why the action should not be dismissed for failure to prosecute; that thereupon, ten and a half months after the arbitrator had rendered his award, petitioners filed a motion to compel respondents to file answers and to answer interrogatories, but no motion to vacate or set aside the arbitration award; that respondents thereupon moved for a dismissal for failure to prosecute, or in the alternative for an order confirming the award, pursuant to both the United States Arbitration Act (9 U.S.C. §9) and the California Arbitration Act (California Code of Civil Procedure §1288) and the federal common law in this area of labor relations, *Board Box Co. v. Courtney*, 368 U.S. 502, 507 (1962); that upon the hearing of the order to show cause, good cause appeared for the dismissal and that the District Court did not abuse its discretion in ordering the dismissal.[2]

Petitioners did not, after the dismissal order, seek to avail themselves of the provisions of Rule 60(b), Fed. Rules Civ. Proc., 18 U.S.C., which authorizes

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[2]Since the District Court dismissed the action, it was not called upon to rule upon respondents' alternative request to confirm the award.

the reopening of cases in which final orders have been individually entered.

The law

Rule 41(b), Fed. Rules Civ. Proc., 18 U.S.C., provides that "[f]or failure of the plaintiff to prosecute or to comply with these rules or any order of court, the defendant may move for dismissal of an action or of any claim against him."

Implementing Rule 41(b), Rule 11 of the Rules of Practice of the United States District Court for the Northern District of California provides, in pertinent part, that:

> "Quarterly, the Calendar Judge shall call a convenient number of cases from the General Civil File wherein no Memorandum to Set has been filed, bring the oldest cases in chronological order according to the filing date thereof, upon an order to show cause, by affidavit or certificate of counsel filed with the Calendar Judge, why such cases should not be dismissed for lack of prosecution.
>
> The Calendar Judge may (1) dismiss such cases for lack of prosecution; . . ."[9]

This Court considered the genesis of Rule 41(b) in *Link v. Wabash Railroad Company*, 370 U.S. 626 (1962), where it said:

> "The authority of a federal trial court to dismiss a plaintiff's action with prejudice because of

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[9]Rule 11's predecessor, Rule 16, was referred to with evident approval by this Court in *Link v. Wabash Railroad Co.*, 370 U.S. 626 at 631, n. 7 (1962), as one of those rules established by the District Courts on their own initiative to cope with "calendar congestion [where it] has become a severe problem."

> his failure to prosecute cannot seriously be doubted. The power to invoke this sanction is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Courts. The power is of ancient origin, having its roots in judgments of nonsuit and non prosequitur entered at common law, e.g., 3 Blackstone, Commentaries (1768), 295-296, and dismissals for want of prosecution of bills in equity, e.g., id., at 451." (at 629-630).

*Link* furthermore held that, despite the literal language of Rule 41(b), the District Court had the inherent power, *sua sponte*, to order a dismissal for want of prosecution—although that question is not really presented by this record because respondents had moved, pursuant to Rule 41(b), to dismiss the complaint (or in the alternative to confirm the arbitration award).

Finally, *Link* established that an order of dismissal for want of prosecution is not to be disturbed on appeal if it is "within the permissible range of the [trial] court's discretion" (370 U.S. at 633); or, put another way, such order is to be sustained unless it "amounted to an abuse of discretion" *(ibid.)*.

By its subsequent denials of certiorari in cases raising related issues, this Court has apparently regarded these principles as no longer open to question. *Cf. Morris v. Florida*, 398 U.S. 950 (1968); *Santana v. United States*, 385 U.S. 849 (1966); *Beaufort Concrete Company v. Atlantic States Construction Co.*, 384 U.S. 1004 (1966).

The Courts of Appeals have consistently and without deviation followed the principles laid down in *Link*:

*Second Circuit*:

*Maiorani v. Kawasaki Kisen K.K., Kobe*, 425 F.2d 1132 (2 Cir. 1970); cert. den. 399 U.S. 910 (1970);

*Theodoropoulos v. Thompson-Starrett Co.*, 418 F.2d 320 (2 Cir. 1969);

*Demaleneere v. Rockwell Manufacturing Co.*, 312 F.2d 209 (2 Cir. 1962);

*Edmond v. Moore-McCormack Lines*, 253 F.2d 143 (2 Cir. 1958).

*Third Circuit*:

*Kenney v. California Tanker Co.*, 381 F.2d 775 (3 Cir. 1967); cert. den. 390 U.S. 904;

*Torino v. Transo Inc.*, 378 F.2d 268 (3 Cir. 1967).

*Fifth Circuit*:

*Hyler v. Reynolds Metal Co.*, 434 F.2d 1064 (5 Cir. 1970);

*Provenza v. H. & W. Wrecking Co.*, 424 F.2d 629 (5 Cir. 1970).

*Eighth Circuit*:

*Grunewald v. Missouri Pacific Railroad Company*, 331 F.2d 983 (8 Cir. 1964).

*Ninth Circuit*:

*Alexander v. Pacific Maritime Association*, 434 F.2d 281 (9 Cir. 1970);

*States Steamship Co. v. Philippine Airlines Co. and Qantas Airways*, 426 F.2d 603 (9 Cir. 1970);

*Gorsuch v. Provident Security Life Insurance Co.*, 332 F.2d 209 (9 Cir. 1963);

*Fitzsimmons v. Gilpin*, 309 F.2d 301 (9 Cir. 1962);

*Montgomery v. Commissioner of Internal Revenue*, 269 F.2d 917 (9 Cir. 1959);

*Agnew v. Moody*, 330 F.2d 668 (9 Cir. 1964).

Tenth Circuit:

*Food Basket, Inc. v. Albertson's, Inc.*, 416 F.2d 937 (10 Cir. 1969);

*Shotkin v. Westinghouse Electric & Manufacturing Co.*, 169 F.2d 925 (10 Cir. 1948).

D.C. Circuit:

*Sharfer v. Warehouse Employees Union Local No. 730*, 408 F.2d 204 (DC Cir. 1969); cert. den. 395 U.S. 934 (1969).

See, additionally, *United States v. Charles Kenz Co.*, 396 F.2d 1013 (CCPA. 1968); and *cf.*, *Kelley v. United States*, 338 F.2d 328, 329 (1 Cir. 1964) and *Estevez v. House of Seagram, Inc.*, 314 F.2d 827, 830 (3 Cir. 1963).

Petitioners themselves concede that "a court has inherent power to dismiss an action for want of diligence in its prosecution" and that such a dismissal is addressed "to the sound discretion of the trial court" (Pet. for Cert., 11).

The three cases relied upon to avoid the application of these universally recognized and salutary rules to this case do not sustain petitioners' position.

In *Kyptok Co. v. Hausmann & Co.*, 217 F. 267 (E.D. Pa. 1914), plaintiff brought suit against a

dealer for infringement of a patent; plaintiff had also sued the dealer's manufacturer in another court, where plaintiff was enjoined from suing the manufacturer's customers, of which the defendant in the pending case was one. After the injunction was reversed by an appeals court, the plaintiff did not immediately take further steps in his action against the dealer but waited until he was awarded a preliminary injunction against the manufacturer on May 25, 1914. Thereafter, on June 18, 1914, less than one month later, he applied for a preliminary injunction against the dealer. The dealer responded by a motion to dismiss for want of prosecution, which the court refused to grant. It seems clear that this act of discretion of a district court taken 57 years ago under different circumstances and different rules is not any basis for reviewing here the Court of Appeals' affirmance of the district court's act of discretion in the instant case.

*Coleman v. Superior Court*, 135 Cal.App. 74, 26 Pac.2d 673 (Ct. App. 1934), also is inapplicable. That case involved the effective date of an amendment to a state statute requiring dismissal under certain circumstances. The court explicitly stated: "That portion of the section which authorized the court to dismiss an action at its discretion is not involved herein . . ." (135 Cal.App. at 76, 26 Pac.2d at 674) and that "irrespective of the sections of the Code involved . . . , the rule [is] reaffirmed that courts have inherent power to dismiss actions where there has been unreasonable delay in bringing the same to trial." (135 Cal.App. at 77, 26 Pac.2d at 674).

*Zeellner v. Neumann*, 214 N.Y.Supp.2d 31, 13 A.D. 2d 723 (App. Div. 1961), is of no more significance here than the two cases discussed above. There, the appellate court stated:

> "The day of the trial, pending the return of the commission on the written interrogatories directed to the witness in Holland, prevented the trial of this cause. It would appear neither party for a substantial period thereafter was aware of the return of the commission." (214 N.Y.Supp. 2d at 32, 13 A.D.2d at 723).

On this ground, the court reversed the dismissal for failure to prosecute. The significant difference is clear. Appellants in the present case cannot, and do not, claim that they were unaware of the arbitrator's award.

Thus it appears that none of these three cases in any way undermines the controlling effect of the more recent decisions of this Court or the Courts of Appeals cited above.

Finally, although petitioners had available to them the "escape hatch" (*Link v. Wabash Railroad Co.*, 370 U.S. 626 at 632 [1962]) provided for by Rule 60(b), Fed. Rules Civ. Proc., 18 U.S.C., they never sought to avail themselves of that corrective remedy. The time to do so is now long past.

## CONCLUSION

The Court of Appeals was manifestly correct in holding that the District Court had not abused its discretion in dismissing the proceeding for want of prosecution. Its decision accords with the decisions of this Court and of other Courts of Appeals which have considered the question.

The petition for a writ of certiorari should be denied.

Dated, San Francisco, California,
March 1, 1971.

Respectfully submitted,
NORMAN LEONARD,
RICHARD ERNST,
*Attorneys for Respondents.*

GLADSTEIN, LEONARD, PATSEY & ANDERSON,
ERNST & DANIELS,
*Of Counsel.*